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No. 74-1381

In the
Supreme Court of the United States
October Term, 1974

WABASH TRANSFORMER CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

George W. Moehlenhof
Frank E. Peters, Jr.
Attorneys for Petitioner

McDermott, Will & Emery
111 West Monroe Street
Chicago, Illinois 60606

The Scheffer Press, Inc.—(312) 263-6850

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STATUTE:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):

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MISCELLANEOUS:

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Wabash Transformer Corporation, by its attorneys, George W. Moehlenhof and Frank E. Peters, Jr., respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on March 4, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix. The Decision and Certification of Representative of the National Labor Relations Board is reported at 205 NLRB No. 38. The Decision and Order of the Board is reported at 210 NLRB No. 68.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on March 4, 1975 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. 160(e).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> Section 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> • • • • •
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> • • • • •
>
> Section 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: • • •
>
> • • • • •
>
> (c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), * * *

* * * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * * If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board has discretion to determine that an election is valid where its agent conducting the election engages in acts admittedly violative of the Board's required neutrality and impartiality?

2. Whether a union's offer made during an organizational campaign to waive the payment of initiation fees and dues until the union has successfully negotiated a contract with the employer destroys the laboratory conditions necessary to the conduct of representation elections under the National Labor Relations Act?

STATEMENT OF THE CASE

1. THE BOARD PROCEEDINGS

On February 28, 1973, the Communications Workers of America (the "Union") filed a petition for a representation election seeking to represent Petitioner's employees in its Farmington, Missouri plant.

On March 16, 1973, an election was conducted in a unit of all production and maintenance employees employed by Petitioner at its Farmington, Missouri plant. The tally of ballots showed that 50 ballots were cast for the Union, 43 were cast against the Union and 9 ballots were challenged.

Petitioner filed timely Objections to conduct affecting the results of the election and to the conduct of the election itself. In its Objections, Petitioner argued that (1) the statement made by an agent of the National Labor Relations Board (the "Board") to the employees, on announcing the opening of the polls, that they were to "go vote *and elect* a union representative" (emphasis supplied) was a breach of the Board's required neutrality in election proceedings and required that a new election be conducted, and (2) the Union's offer, made prior to the election, to waive the payment of initiation fees and dues for employees who joined the Union, interferred with the employees' right to refrain from union activity.

On April 25, 1973 the Regional Director issued his Report on Challenged Ballots and Objections and Recommendations wherein he recommended that Petitioner's Objections be dismissed in their entirety. The Board, Chairman Miller dissenting, adopted the Regional Director's recommendations and on July 31 certified the re-

sults of the March 16 election. 205 NLRB No. 38 Chairman Miller dissented from the majority opinion stating that the Board agent's conduct in announcing the opening of the polls was a breach of the Board's standards of neutrality. With respect to the Board's statutory responsibility in representation cases, Chairman Miller concluded that:

> ". . . where a representative of this Board, even unwittingly, fails to preserve not only the fact of our neutrality, but also the appearance of neutrality, we must rerun the election." 205 NLRB No. 38

Thereafter Petitioner refused to bargain with the Union based upon its assertion that the election was invalid and that the subsequent certification was improper. Following a hearing before an Administrative Law Judge, the Board affirmed the Judge's conclusion that Petitioner's refusal to bargain violated the National Labor Relations Act (the "Act") and ordered Petitioner to bargain with the Union. 210 NLRB No. 68

II. THE DECISION OF THE COURT OF APPEALS

The Court below granted enforcement of the Board's Order. Although the Board had concluded that the questioned statement was violative of the Board's standard of neutrality, the Court below held that the Board may disregard its own lack of neutrality where, in its discretion, it determines that an election was valid despite the conceded misconduct of its agent. The decision below permits the Board discretion to determine that an election is valid notwithstanding the overt partiality of the Board agent's conduct during the election.

With respect to the Union's offer to waive the payment of initiation fees and dues until after the election, the Court below construed this Court's decision in *N.L.R.B.* v. *Savair Mfg. Co.*, 414 U.S. 270 (1973) as permitting a union to secure endorsements by waiving the payment of initiation fees and dues provided that the waiver is temporary and is made available to all employees. See pp. 4a and 5a in Appendix.

REASONS FO. NTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISION OF OTHER COURTS OF APPEAL AS TO THE NEUTRALITY AND IMPARTIALITY REQUIRED OF AGENTS OF THE BOARD WHILE CONDUCTING REPRESENTATION ELECTIONS.

The decision below, that the Board may disregard neutrality standards where, in its discretion, it determines that an election is valid despite the conceded partiality of its agent, conflicts with the decision of the Court of Appeals for the 1st Circuit in *N.L.R.B.* v. *Athbro Precision Engineering Corp.*, 423 F.2d 573 (1st Cir., 1970) and the decisions of the Court of Appeals for the 5th Circuit in *Delta Drilling Co.* v. *N.L.R.B.*, 406 F.2d 109 (5th Cir., 1969) and *N.L.R.B.* v. *Dobbs Houses, Inc.*, 435 F.2d 704 (5th Cir., 1970).

In the present case, the Board acknowledged that the statement by its agent on announcing the opening of the polls that "the polls are open and you may now go vote and elect a union representative" was a violation of the Board's standard of neutrality. See page 12a in Appendix. Notwithstanding this fact, the Board upheld the election. Stated simply, the decision of the Board concedes the partiality of its agent's conduct during the election process but excuses this breach of procedure as inconsequential. The 8th Circuit enforced the Board's Order holding, in effect, that the Board has discretion to decide whether or not it will be bound by its statutory obligation of neutrality. See p. 3a in Appendix.

In enforcing the Board's Order, the Court below ignored the decisions of the Court of Appeals for the 1st Circuit in *N.L.R.B.* v. *Athbro Precision Engineering Corp., supra,*

and the decision of the Court of Appeals for the 5th Circuit in *N.L.R.B.* v. *Delta Drilling Co., supra,* and *N.L.R.B,* v. *Dobbs Houses, Inc., supra.* In *Athbro,* the 1st Circuit, although enforcing the Board's Order on procedural grounds, held that the commission of an act by an agent of the Board while conducting an election which "could reasonably be interpreted as impugning" the Board's neutrality, requires that election is to be set aside.[1] 423 F.2dat 575

The Court of Appeals for the 5th Circuit has also considered the question of the Board's neutrality in representation elections. In *Delta Drilling Co., supra,* the 5th Circuit considered the conduct of a Board agent who was seen visiting a union representative in a hotel room between polling periods. The Court concluded that this breach of the Board's neutrality by the agent conducting the election was a violation of Board policy, "which the employer was entitled to have obeyed, inviolate, free of so much as the appearance of evil". 406 F.2d at 114

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[1] In *Athbro Precision Engineering Corp.,* 166 NLRB 966 (1967), the Board formulated the rules that it would follow in reviewing the conduct of its agents in representation elections. The Board formulated its rule as follows:

> "The Board in conducting representation elections must maintain and protect the integrity and neutrality of its procedures. The commission of an act by a Board Agent conducting an election which tends to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards which we seek to maintain, is a sufficient basis for setting aside that election."

In commenting on the appropriateness of this rule, the 1st Circuit noted that the Board's decision was the correct one and that "the rerunning of an occasional election is a small price to pay for the preservation of public respect". 423 F.2d at 575

In *N.L.R.B.* v. *Dobbs Houses, Inc., supra,* the 5th Circuit again considered the conduct of Board agents in representation elections.[2] In this case, the 5th Circuit cited with approval the Athbro principle, stating that conducting during an election "inconsistent with the Board's agent's required impartiality" requires that the election be set aside. 423 F.2d at 705

The law is well settled in the 1st and 5th Circuits that where agents of the National Labor Relations Board have, by their own conduct, failed to preserve the Board's neutrality in the election process, the Board may not thereafter certify the results of that same election. The decision below cannot be reconciled by distinguishing these decisions factually because the Board admits that its agent's statement abridged its neutrality. The only question before the 8th Circuit was whether or not the Board abused its discretion by thereafter issuing a certification of the election in spite of the admitted partiality of its agent.

Petitioner respectfully submits that the 8th Circuit Court of Appeals is erroneous and that the proper standard of review is to be found in the decisions of the 1st and 5th Circuits. It is true that Congress has granted the Board a wide range of discretion in conducting representation elections under the Act. However, Congress has not granted the Board discretion to determine whether or not it shall remain neutral and impartial in conducting

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[2] In *N.L.R.B.* v. *Dobbs Houses, Inc., supra,* the Board agent conducting the election was found to have replied to a question advanced by the employer's observer to the effect that the Board agent felt that the Union would benefit the employees. In enforcing the Board's Order, the Court held that an employer will not be permitted to challenge the Board's neutrality through the act of the employer's own agent.

representation elections. Where the Board has deviated from the standard of absolute and complete neutrality, it has breached its statutory obligation, violated its Congressional mandate and its actions no longer are entitled to judicial sanction.

2. THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THE SUPREME COURT OF THE UNITED STATES AS TO THE STATUTORY OBLIGATIONS OF THE NATIONAL LABOR RELATIONS BOARD IN CONDUCTING REPRESENTATION ELECTIONS.

The decision below accords the National Labor Relations Board discretion to determine whether or not it is required to remain neutral in representation elections and conflicts with the decisions of this Court in *N.L.R.B.* v. *A. J. Tower Co.*, 329 U.S. 324 (1946) and *N.L.R.B.* v. *Savair Mfg. Co.*, 414 U.S. 270 (1973).

In *N.L.R.B.* v. *A. J. Tower, supra,* this Court considered the scope of the Board's discretion in conducting representation elections under the National Labor Relations Act. In *Tower,* this Court held that Congress has granted the Board a wide degree of discretion but that the exercise of that discretion in establishing representation election procedures must guarantee ". . . the fair and free choice of bargaining representative by employees". 329 U.S. 330

More recently, in *N.L.R.B.* v. *Savair Mfg. Co., supra,* this Court again considered the scope of the Board's discretion in conducting elections under Section 9(c)(1)(A) of the Act. Citing its prior decision in *Tower,* this Court in *Savair* reaffirmed its position that the responsibility of the Board in conducting representation elections is to establish procedures and safeguards which "insure the fair and free choice of bargaining representatives by em-

ployees." 414 U.S. 270, 276; citing *N.L.R.B.* v. *A. J. Tower Co.*, 329 U.S. 324, 330.

In *Savair*, the Court was called upon to review the Board's policy of permitting unions to waive the payment of initiation fees during union organization campaigns. The Board argued before this Court that Congress entrusted the regulation of such matters to the Board and that the Board's policy of permitting the waiver of initiation fees was a matter for the Board's discretion. The Court properly rejected this argument because the policy of the Board failed to guarantee to all employees, those opposed to unionization as well as those in favor of unionization, the opportunity to cast a free and uncoerced ballot. Addressing itself to the Board's discretion in establishing policies pursuant to 9(c)(1)(A) of the Act, this Court concluded that inherent in the principles of 9(c)(1)(A) is the proposition that the right of free choice must always be present in representation elections. As to the Board's discretion in such matters, this Court held that

> "The Board in its supervision of union elections may not sanction procedures that cast their weight *for the choice of a union* and against a non-union shop or for a non-union shop and against a union." 414 U.S. 270, 280 (Emphasis supplied)

The Board agent's direction to employees to "elect a union representative" which was sanctioned by the Board is grammatically equivalent to the italicized description of procedures prohibited by this Court in *Savair*. The decision below would permit the Board discretion to determine whether or not it will remain neutral in representation elections. As this Court has pointed out in *Tower* and *Savair*, the Board's discretion does not include dis-

cretion to sanction procedures which favor one of the choices in a representation election. Clearly then, as here, the Board may not certify elections wherein the conduct of its agents is admittedly less than completely neutral and totally impartial for such conduct is incompatible with a free and fair choice of bargaining representative by employees.

3. THE DECISION BELOW RAISES SUBSTANTIAL AND RECURRING PROBLEMS IN THE ADMINISTRATION OF THE NATIONAL LABOR RELATIONS ACT.

The Court of Appeal's decision will permit the 9,000 Labor Board elections conducted annually to be handled in a manner which the Board concedes is improper, which will compromise the Board's image of neutrality, and which will destroy public confidence in the integrity of the Board's procedures and in certifications of representatives issued pursuant thereto.[3]

The Board's conduct of representation elections is one of the most controversial procedures performed by the United States Government. Through these elections, the control of an employee's livelihood is delegated to a third party—against his will if he votes with the minority.

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[3] See *Wald Sound, Inc.*, 203 NLRB No. 61 (1973), wherein Member Kennedy argued, in dissent, that "when unions and employers invest substantial time, effort, and money in an organizational campaign, it is incumbent upon the Board to conduct an election in a manner which inspires confidence in the impartiality and competence of the Board and its agents. There is no function or mission of this agency of greater importance than running fair elections". See also, Williams, Janus and Huhn, *NLRB Regulation of Election Conduct,* The Wharton School, Industrial Research Unit, Report No. 8, Pages 355-362, (1974).

The rule followed by the 8th Circuit in this case is more than detrimental to parties in this and other representation proceedings. The rule followed by the 8th Circuit seriously questions the continued ability of the National Labor Relations Board to administer the national labor policy. The importance of the Board's neutrality cannot be understimated for it is public confidence in the impartiality of the Board and its agents that justifies the Board's existence.

The public cannot be assumed to have confidence in and respect for the decisions of this agency conducting representation proceedings without the guarantee of neutrality. The effect of the Board's decision is to remove an obligation of neutrality in the conduct of representation proceedings and to replace it with a quantum of discretion to be arbitrary. Should the Court's decision be allowed to survive as precedent, employers and employees alike will be asked to accept as the primary government agency responsible for policing their relationships, an institution in which neither will have confidence.

4. THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THE SUPREME COURT OF THE UNITED STATES AS TO THE CONSEQUENCES OF A UNION'S OFFER TO WAIVE THE PAYMENT OF INITIATION FEES AND DUES PRIOR TO AN ELECTION.

The decision below interprets this Court's decision in *N.L.R.B.* v. *Savair Mfg. Co., supra,* as permitting a union to waive the payment of initiation fees and dues where that waiver is temporary and made availabe to all employees. See pp. 4a, 5a in Appendix. Petitioner submits that the decision of the 8th Circuit Court of Appeals is an unwarranted narrowing of this Court's decision in *Savair*

wherein this Court held that the pre-election waiver of initiation fees interferes with the employees' right to refrain from union activity and is contrary to the right of a fair and free choice of bargaining representatives by employees inherent in Section 9 of the Act. *N.L.R.B.* v. *Savair Mfg. Co.*, 414 U.S. 270 at 275-281.

The 8th Circuit and the Board have interpreted this Court's decision in *Savair* as prohibiting a union's waiver of the payment of initiation fees *only* where the waiver is limited to employees who sign authorization cards prior to the election. The Board concluded that since the waiver in the present case was theoretically available to all employees until such time as the union successfully negotiated a contract with the employer, the rights of employees to refrain from union activity were not thereby affected. Petitioner respectfully submits that the Board has improperly narrowed the Court's decision in *Savair* to suit its own purposes. Whether or not the waiver remains open following an election is immaterial in assessing the effect of that waiver when it is made prior to the election. Thus, in the present case, the waiver of initiation fees was coercive because it was made prior to the election to induce employees to sign authorization cards. Here, as in *Savair*, the Union was able to secure endorsements on its behalf and then to pyramid these endorsements when later seeking out those less convinced of the advantages of unionization. Petitioner respectfully submits that this is precisely the activity which this Court intended to prohibit by its *Savair* decision.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the 8th Circuit.

Respectfully submitted,

McDermott, Will & Emery
George W. Moehlenhof
Frank E. Peters, Jr.
Attorneys for
Wabash Transformer Corporation

McDermott, Will & Emery
111 West Monroe Street
Chicago, Illinois 60603
Telephone: (312) 372-2000

APPENDIX

UNITED STATES COURT OF APPEALS
For The Eighth Circuit
No. 74-1446

NATIONAL LABOR RELATIONS BOARD, *Petitioner*, v. WABASH TRANSFORMER CORPORATION, *Respondent*.	On Application for Enforcement of an Order of The National Labor Relations Board.

Submitted: December 11, 1974.

Filed: February 3, 1975.

Before LAY and BRIGHT, Circuit Judges; and TALBOT SMITH, Senior District Judge.*

BRIGHT, Circuit Judge.

The National Labor Relations Board (Board) petitions for enforcement of its order issued against Wabash Transformer Corporation (Employer) of Farmington, Missouri, directing the Employer to bargain with the Communications Workers of America (Union) pursuant to 29 U.S.C. §158(a)(5). The Employer, refusing to bargain, claims that the representation election was conducted in an unfair manner and that the subsequent certification of the Union by the Board was therefore invalid. We grant the order of enforcement.

Pursuant to a petition filed by the Union, a representation election was held for all production and maintenance

* TALBOT SMITH, Senior District Judge, Eastern District of Michigan, sitting by designation.

workers at the Employer's Farmington, Missouri, plant on March 16, 1973. The Union won the election on a 50-43 vote and, after timely objections were filed by the Employer, a three-member panel of the Board validated the election and certified the Union as the exclusive bargaining agent for the workers at the Farmington plant.[1] The Employer's refusal to bargain generated this unfair labor practice proceeding. The Board, on April 30, 1974, ruled that the Employer had violated §§8(a)(5) and (1) of the Act [29 U.S.C. §§158(a)(5) and (1)], and ordered it to bargain with the Union.[2] The instant appeal followed.

The Employer objects to the conduct of the representation election on two grounds. First, it claims that the Board's agent conducting the election breached the Board's obligation of neutrality by announcing the opening of the polls over the Employer's loudspeaker system in the following manner:

> The Polls are open and you may now go vote and elect a union representative.[3]

Second, the Employer contends that the promise of the Union to waive the payment of initiation fees and dues until after the election and until the Union had negotiated a collective bargaining agreement with the Employer violated the recent Supreme Court decision of *NLRB* v. *Savair Mfg. Co.*, 414 U.S. 270 (1973).

I.

In upholding the election, the Board acknowledged that its agent, in announcing the election over the loudspeaker,

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[1] This decision is reported as *Wabash Transformer Corporation*, 205 NLRB 38 (1973) (Chairman Miller dissenting).

[2] This decision is reported at 210 NLRB 68 (1974) (Chairman Miller dissenting).

[3] The parties are in some disagreement over the exact phrasing of the agent's statement. We accept the above-quoted version as offered by the Employer.

should have explicitly stated that an employee could vote against as well as for a Union representative. However, the Board majority declined to adopt the view that the agent's statement was *per se* violative of the Board's standards of neutrality. The Board concluded that the circumstances surrounding the statement established that the integrity of the election process was not so impaired as to warrant the ordering of a new election. We agree.

The announcement was made at approximately 6:30 A.M., immediately prior to the early morning opening of the polls, to accommodate three workers who were completing their night shift.[4] About 20 other employees were in the plant waiting for the morning shift to begin and may have heard the announcement. The same announcement, however, was not repeated when the polls reopened at 2:30 P.M. to receive votes from the workers on the morning and afternoon shifts. More importantly, the Director of Manufacturing for the Employer, who was present in the plant when the statement was made at 6:30 A.M., voiced no objection to the announcement. No evidence indicates that any employee was misled by the announcement and no claim is made that the Board's agents conducting the election favored the Union over the Employer.

The Supreme Court has observed, "Congress granted the Board a wide discretion to ensure the fair and free choice of bargaining representatives." *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969). *See NLRB* v. *A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *NLRB* v. *Waterman S.S. Co.*, 309 U.S. 206, 226 (1940). Under the circumstances here, the ruling that the questioned statement did not breach the neutrality of the election procedures fell within the Board's discretionary powers.

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[4] The Employer operates three shifts—11:00 P. M. to 7:00 A. M., 7:00 A. M. to 3:30 P.M., and 3:30 to 11:00 P. M. The polling sessions were from 6:30 to 7:00 A.M. and from 2:30 to 5:00 P. M.

II.

The Employer also contends that the Union's waiver of dues and initiation fees until after negotiation of a bargaining agreement[5] enabled the Union, in effect, to "buy" members before the election and portray a false picture of its employee support in violation of the rule laid down in *NLRB* v. *Savair Mfg. Co.*, 414 U.S. 270 (1973). In *Savair*, the Court found that a union's offer to waive initiation fees for those workers signing union authorization cards before the certification election constituted an unfair labor practice. The Court reasoned:

> Whatever his true intentions, an employee who signs a recognition slip prior to an election is indicating to other workers that he supports the union. His outward manifestation of support must often serve as a useful campaign tool in the union's hands to convince other employees to vote for the union, if only because many employees respect their coworkers' views on the unionization issue. By permitting the union to offer to waive an initiation fee for those employees signing a recognition slip prior to the election, the Board allows the union to buy endorsements and paint a false portrait of employee support during its election campaign. [*Id.* at 277.]

The Board reads *Savair* as precluding waivers of fees only when they are offered to employees as an induce-

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[5] The Union distributed a leaflet on March 12, 1973, reading in relevant part:

> Dues $5.50! Yes, your dues will be $5.50 — AFTER WE HAVE SUCCESSFULLY BARGAINED A CONTRACT WITH THE WABASH TRANSFORMER CORPORATION — NOT A CENT BEFORE WE REACH AN AGREEMENT! This is a reasonable premium to insure better wages, fringe benefits and working conditions, plus a strong voice to review your grievances with the Company.

ment for pre-election support. The Board contends that the coercive effects of the practice condemned in *Savair* are absent in the instant case. We agree. The temporary waiver of dues for *all employees* does not have the effect of encouraging employees to make a false show of support for the Union in order to gain relief from certain fees. Indeed, a union's promise of temporary waiver of dues for all potential union members may serve to counteract an oft-used management argument that unions require workers to pay dues without guaranteeing the receipt of any tangible benefits.[6] Here, the Union assured the workers, whether Union supporters or not, that the Union demanded no dues until it successfully obtained a contract from the Employer. Such campaign tactics are not proscribed by *Savair*. The majority opinion in *Savair* notes the following:

> The Board argues that unions have a valid interest in waiving the initiation fee when the union has not yet been chosen as a bargaining representative, because "'[e]mployees otherwise sympathetic to the union might well have been reluctant to pay out money before the union had done anything for them. Waiver of the [initiation fees] would remove this artificial obstacle to their endorsement of the union.'" • • • While this union interest is legitimate, the

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[6] A leaflet, dated February 16, 1973, prepared by the Company for distribution to employees, reads in part:

> *Now lets discuss union dues*: On this subject the union organizer does give you some facts. He says you are going to have to pay $6.50 per month for men; $6.00 per month for women. That's more than $10,000 a year he's going to extract from your collective pockets. No wonder he's interested in organizing this plant.

In addition, the envelopes with the workers' paychecks on March 9, 1973, contained the following message:

> IF YOU BELONGED TO THE CWA TODAY THIS PAY CHECK WOULD BE SHORT $5.50 FOR THIS MONTH'S UNION DUES — THINK ABOUT IT!!!

> Board's argument ignores the fact that this interest can be preserved as well by waiver of initiation fees available not only to those who have signed up with the union before an election but also to those who join after the election. The limitation imposed by the Union in this case—to those joining before the election—is necessary only because it serves the additional purpose of affecting the Union organizational campaign and the election. [414 U.S. at 274 n.4.]

See NLRB v. *Stone & Thomas*, 502 F.2d 957 (4th Cir. 1974).

Accordingly, we direct that the Board's order be enforced.

UNITED STATES COURT OF APPEALS

• • (Caption — No. 74-1446) • •

JUDGMENT

Before: LAY and BRIGHT, *Circuit Judges*; and TALBOT SMITH, *Senior District Judge.*•

This Cause came on to be heard upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, Wabash Transformer Corporation, Subsidiary of Wabash Magnetics, Inc., its officers, agents, successors and assigns, on April 30, 1974. The Court heard argument of respective counsel on December 11, 1974, and has considered the briefs and transcript of record filed in this cause. On February 3, 1975, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

On Consideration Whereof, it is hereby ordered and adjudged by the United States Court of Appeals for the Eighth Circuit that the said Order of the National Labor Relations Board in said proceedings be enforced and that Wabash Transformer Corporation, Subsidiary of Wabash Magnetics, Inc., its officers, agents, successors and assigns, abide by and perform the directions of the Board in said order contained.

Dated: March 4, 1975

ORDER

Respondent, Wabash Transformer Corp., a subsidiary of Wabash Magnetics, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from refusing to bargain, upon request, with Communications Workers of America, AFL-CIO, as the exclusive bargaining representative of the employees in the following appropriate unit:

All production and maintenance employees employed at Respondent's Farmington, Missouri, facility, in-

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• Talbot Smith, Senior District Judge, Eastern District of Michigan, sitting by designation.

cluding the leadgirls, but excluding office clerical and professional employees, guards and supervisors as defined in the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit described above, and if an understanding is reached, upon request, embody such understanding in a signed agreement.

(b) Post at its Farmington, Missouri plant, copies of the attached notice marked "Appendix."[3] Copies of said notice of forms provided by the Regional Director for Region 14, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 14, in writing, within 20 days from the receipt of this Decision, what steps Respondent has taken to comply herewith.

Dated at Washington, D.C., February 11, 1974.

/s/ Fannie M. Boyls
Fannie M. Boyls
Administrative Law Judge

• • • • •

[3] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL, upon request, bargain collectively with COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, as the exclusive bargaining representative of our employees in the following appropriate unit:

> All production and maintenance employees employed at our Farmington, Missouri, facility, including the leadgirls, but excluding office clerical and professional employees, guards and supervisors as defined in the National Labor Relations Act.

Also, upon request, WE WILL embody any understanding reached in a signed agreement.

WABASH TRANSFORMER CORP.,
Subsidiary of Wabash Magnetics, Inc.
(Employer)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 210 North 12th Boulevard, Rm 448, St. Louis, Missouri 63101
(Tel No. 314 - 622-4167).

UNITED STATES OF AMERICA
Before The National Labor Relations Board

Wabash Transformer Corporation
Employer

and

Communications Workers of America, AFL—CIO
Petitioner

Case 14—RC—7260

DECISION AND CERTIFICATION
OF REPRESENTATIVE

Pursuant to a Stipulation for Certification Upon Consent Election, an election by secret ballot was conducted under the supervision of the Regional Director for Region 14 among the employees in the appropriate unit on March 16, 1973. At the conclusion of the election the parties were furnished a tally of ballots which showed that of approximately 109 eligible voters, 102 cast valid ballots, of which 50 were for, and 43 were against, the Petitioner. Nine ballots were challenged, which were sufficient in number to affect the results of the election. On March 23, the Employer filed objections to the election.

In accordance with the National Labor Relations Board's Rules and Regulations, Series 8, as amended, the Regional Director conducted an investigation of the issues raised by the challenges and objections and on April 25, issued and served on the parties his Report on Challenged Ballots and Objections attached hereto in pertinent part. In his report, the Regional Director recommended that the challenges to the ballots of Linda Lindsey, Dana Smith, Terry Thomas, and Lucinda Sander be sustained, and that the remaining challenges not be considered on their merits as the results of the election were conclusive. The Regional Director further recommended that the Employer's objections be overruled in their entirety and a certification of representative issued. Thereafter, the Employer filed exceptions limited to the Regional Director's dis-

position of the objections and Petitioner filed an answering letter.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of the employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The following employees, as stipulated by the parties, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed at the Employer's Farmington, Missouri facility, including the lead girls, but excluding office clerical and professional employees, guards, and supervisors as defined in the Act.

5. The Board has considered the Regional Director's report, the Employer's exceptions thereto, the Petitioner's answering letter, and the entire record in this case, and hereby adopts the Regional Director's findings[1] conclusions,[2] and recommendations.

---

[1] In the absence of exceptions, we adopt *pro-forma* the Regional Director's disposition of the challenged ballots.

[2] The Employer's exceptions, in our opinion, raise no material or substantial issues of fact or law which would warrant reversal of the Regional Director's recommendations.

6. Contrary to our dissenting colleague, we cannot agree that the mere statement of the Board agent that the polls were open and the employees could, if they desired, "now vote for your union representative" is a sufficient basis to set aside this election. Obviously, a Board election is an election to select a union representative. While the Board agent may have and should have made explicit what was implicit in the announcement, i.e., that the right to vote for the union necessarily carried with it the right to vote against the union, we do not believe that the agent's statement was *per se* so violative of the Board's standards of neutrality or so prejudicial to the employees' right to cast a negative vote that a new election must be directed.

Accordingly, as the tally shows that the Petitioner has obtained a majority of the valid ballots cast, we shall certify it as the exclusive bargaining representative of the employees in the appropriate unit.

CERTIFICATION OF REPRESENTAATIVE

It is hereby certified that a majority of the valid ballots have been cast for Communications Workers of America, AFL—CIO, and that pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the unit found appropriate herein for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

Dated, Washington, D.C.

John H. Fanning, Member
John A. Penello, Member
National Labor Relations Board

(Seal)

Chairman MILLER, dissenting:

Contrary to my colleagues, I would sustain the Employer's objection that the wording of the Board agent's preelection announcement to the prospective voters violated the Board's standards of complete and unquestionable neutrality in its election processes.

The essential facts as found by the Regional Director are not in dispute. At the preelection conference the parties agreed that one of the Board agents conducting the election would notify the employees by means of an announcement over the plant intercom system that the polls were open and that the employees could proceed to the voting area. After inspecting the polling areas, the Board agent announced the opening of the polls over the intercom in the following manner, according to her version: "Good morning. I am . . . of the National Labor Relations Board. You may now vote for your union representative. The polls are open, you may vote if you want to. You do not have to vote if you do not want to."[3] No other qualifying statements were made and the employees immediately proceeded to the voting areas to cast their ballots.

It is undisputed that the Board agent identified herself as a representative of this Board and then proceeded to announce the opening of the polls in a manner which substantially departed from our official instructions to voters. My colleagues are willing to excuse this particular deviation since in their opinion the Board's preelection notices and the Employer's campaign literature distributed to employees adequately neutralized any prejudicial effect

[3] Although the Employer's witness' statement is somewhat different, it is of the same tenor and effect: "The polls are now open and you may now go vote and elect a union representative." To the extent the version offered by the Employer's witness is more questionable, we must of course, in the absence of a hearing to resolve credibility, accept that version.

the Board agent's statement may have on the prospective voters. I am unwilling to so speculate, and am of the view that where a representative of this Board, even unwittingly, fails to preserve not only the fact of our neutrality, but also the appearance of neutrality, we must rerun the election.[4]

In view of the foregoing, I would set aside the election and direct a second election.

Dated, Washington, D.C.

Edward B. Miller, Chairman
National Labor Relations Board

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[4] *Athbro Precision Engineering Corp.*, 166 NLRB 966, cited with approval in *N.L.R.B.* v. *Athbro Precision Engineering Corp.*, 423 F. 2d 573 (C.A. 1); *Delta Drilling Company* v. *N.L.R.B.*, 406 F.2d 112 (C.A. 5). Cf *Cummer-Graham Company*, 73 NLRB 603, 609, 610.

UNITED STATES OF AMERICA

Before The National Labor Relations Board

Wabash Transformer Corporation,
Subsidiary of Wabash Magnetics, Inc.
and
Communications Workers of America, AFL—CIO
Cases 14—CA—7420—1
14—CA—7420—2
14—CA—7548

DECISION AND ORDER

On February 11, 1974, Administrative Law Judge Fannie M. Boyles issued the attached Decision in this proceeding.[1] Thereafter, Respondent filed exceptions and a supporting brief and request for oral argument.[2]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the Administrative Law Judge's rulings, findings, and conclusions as modified herein and to adopt her recommended Order.

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[1] As set forth in the attached Decision, the Administrative Law Judge issued the said Decision disposing solely of the alleged violation of Sec. 8(a)(5) insofar as it is based on the Respondent's refusal to honor the certification and bargain with the Union. She retained the remaining aspects of the case for disposition in a supplemental decision to be issued at a later date.

[2] Respondent's request for oral argument is hereby denied as, in our opinion, the record in this case, including the exceptions and brief, adequately presents the issues and positions of the parties.

In the underlying Representation proceeding,[3] the Board considered the Regional Director's report and adopted the Director's findings, conclusions, and recommendations. In said report, he found, *inter alia*, that the Employer's Objection 2 did not warrant setting the election aside. In that objection the Employer asserted that: "During the period preceding the election, the Petitioner has offered economic rewards to employees for engaging in union activity." The Employer specifically alleged that the Petitioner waived the payment of its monthly membership dues for the purpose of inducing employees to vote for it in the election.

As described in the Regional Director's report on objections in that case, the Union distributed a leaflet on March 12, 1973, which stated in material part:

> Dues $5.50! Yes, your dues will be $5.50—AFTER WE HAVE SUCCESSFULLY BARGAINED A CONTRACT WITH THE WABASH TRANSFORMER CORPORATION—NOT A CENT BEFORE WE REACH AN AGREEMENT! This is a reasonable premium to insure better wages, fringe benefits and working conditions, plus a strong voice to review your grievances with the Company.

In addition the Director's report states that the Union acknowledged that during organization campaigns its established procedure has been to inform employees they will not be required to pay membership dues until it has successfully bargained a contract with the employer, and that, pursuant to that practice, the Union's administrative assistant, Crawley, in response to an employee's question, said that employees would not be required to pay dues or fees until after the Union had been certified and obtained a collective-bargaining agreement with the Employer. The Director concluded that the investigation failed to establish other than that during the relevant period the Union *deferred* the payment of initiation fees and dues until after

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[3] *Wabash Transformer Corporation*, 205 NLRB No. 38, Chairman Miller dissenting.

certification and a collective-bargaining agreement had been reached. In support of his conclusion that the conduct did not interfere with the election, he cited *DITMCO, Incorporated,* 163 NLRB 1019, 1022, and *EFCO Corporation,* 185 NLRB 220. The Administrative Law Judge, in her decision in the instant proceeding, found that since the Board had in the representation proceeding overruled all objections to the election, she was without authority to make an independent determination. Accordingly, she concluded that the election was valid, the Union was properly certified, and the Respondent's refusal to bargain was in violation of the Act.

Respondent admits that it refused to bargain in order to test the Board's certification of the Union. In its exceptions to the Administrative Law Judge's Decision, Respondent does not dispute the facts as found by the Regional Director and summarized above, but contends that the Board should now find that the Union's waiver of the initiation fees and dues interfered with the election, relying on the U.S. Supreme Court opinion in *N.L.R.B.* v. *Savair Manufacturing Company,* ..... U.S. ....., 94 S.Ct. 495 (Dec. 17, 1973). Respondent argues that the Supreme Court refused to enforce a Board bargaining order therein under similar factual circumstances because the underlying certification was invalid, and that the Board should dismiss the instant 8(a)(5) charges. We do not agree with Respondent that the factual situation of this case and *Savair* are the same.

In *Savair,* the Supreme Court observed that a union could preserve its legitimate interest by the "waiver of initiation fees available not only to those who have signed up with the union before an election but also to those who join after the election."[4] Here, unlike *Savair,* there was not a waiver limited to those who signed a card for the Union before the election. Rather, in the case before us, the "waiver" extended to all employees, as no employee, whether or not he gave preelection support to the

[4] Fn. 4 of *Savair, supra.*

Union, was required to pay initiation fees or dues until after the Union was certified and had a contract with the Employer. We find, therefore, that this was not an improper waiver under the holding of *Savair* and it did not interfere with the election.[5] Accordingly, we agree with the Administrative Law Judge that the Respondent violated Section 8(a)(5) in refusing to recognize and bargain with the certified Union.[6]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, and hereby orders that Respondent, Wabash Transformer Corporation, Subsidiary of Wabash Magnetics, Inc., Farmington, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the aid recommended Order.

Dated, Washington, D.C., April 30, 1974.

Edward B. Miller, Chairman
John H. Fanning, Member
John A. Penello, Member
National Labor Relations Board

(Seal)

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[5] *Irwindale Division, Lau Industries, A Division of Phillips Industries, Inc.*, 210 NLRB No. 42.

[6] Chairman Miller concurs in his colleagues' disposition of the *Savair* issue, but dissents from the finding of an 8(a)(5) violation. For the reasons set forth in his dissent in the underlying representation case, he is of the view that this certification was improvidently issued and that the election should, instead, have been set aside.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1381

WABASH TRANSFORMER CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 509 F.2d 647. The Board's decision and order (Pet. App. 15a-18a) are reported at 210 NLRB No. 68; the underlying representation decision (Pet. App. 10a-14a) is reported at 205 NLRB 148.

JURISDICTION

The judgment of the court of appeals (Pet. App. 7a) was entered on March 4, 1975. The petition for a writ of certiorari was filed on May 2, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that the Union's pre-election offer to waive initiation fees and dues for all employees who joined the union before a collective bargaining agreement was executed did not preclude a free choice in the election.

2. Whether the Board properly found that its agent did not engage in conduct which displayed partiality toward the union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 2-3 of the petition.

STATEMENT

A. The Board Proceedings

Pursuant to a petition filed by the Communication Workers of America, AFL-CIO (the Union), a Board-conducted representation election was held among the production and maintenance employees of the Wabash Transformer Corporation's (Company) Farmington, Missouri plant, which the Union won by a vote of 50-43 (Pet. App. 10a). Thereafter, the Company filed objections to the conduct of the election alleging, *inter alia*, that: (1) the Union improperly induced employee support by waiving initiation fees and dues until after a collective bargaining agreement was executed; (2) the Board agent displayed partiality toward the Union by announcing that the polls were open and that the employees could now vote and elect a union representative (A. 28, 41, 43-44).[1]

The Regional Director, based on an administrative investigation, made the following findings and conclusions:

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[1] "A." references are to the printed appendix used in the court below. A copy has been lodged with the Court.

During the election campaign, the Union distributed a leaflet to the employees which read, in part (A. 43):

> Dues $5.50! Yes, your dues will be $5.50—AFTER WE HAVE SUCCESSFULLY BARGAINED A CONTRACT WITH THE WABASH TRANSFORMER CORPORATION—NOT A CENT BEFORE WE REACH AN AGREEMENT! This is a reasonable premium to insure better wages, fringe benefits and working conditions, plus a strong voice to review your grievances with the Company.[2]

In addition, the Union's administrative assistant told employees at a meeting, in response to their questions, that they would not be required to pay either dues or initiation fees until after the Union had been certified and had obtained a collective bargaining agreement with the Company (A. 41). The Regional Director concluded that the Union's promise of deferral of initiation fees and dues for all employees until after certification and consummation of a collective-bargaining agreement did not interfere with the election (A. 43).

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[2]The Union's leaflet was distributed after the Company distributed two leaflets, the second in the employees' paycheck envelopes, which stated, *inter alia*:

> (1) *Now lets discuss union dues*: On this subject the union organizer does give you some facts. He says you are going to have to pay $6.50 per month for men; $6.00 per month for women. That's more than $10,000 a year he's going to extract from your collective pockets. No wonder he's interested in organizing this plant.
>
> (2) IF YOU BELONGED TO THE CWA TODAY THIS PAYCHECK WOULD BE SHORT *$5.50* FOR THIS MONTH'S UNION DUES - - - - - THINK ABOUT IT!!! [A. 42-43.]

The parties agreed that the election would be conducted on March 16, 1973, in two polling sessions, the first from 6:30 a.m. to 7 a.m., and the second from 2:30 p.m. to 5 p.m.[3] The early morning voting period was to accommodate the three anticipated voters on the Company's 11 p.m. to 7 a.m. shift. (A. 44.) On March 16, in accordance with a prior understanding that the Board agent would notify the employees over the plant intercom that the polls were open, Company official Liston, in his office, showed Board agent Van der Horst how to operate the plant intercom. Liston then went into the plant cafeteria which adjoined the office. At approximately 6:30 a.m., according to Liston, the Board agent announced that the polls were opened and that the employees could "now go vote and elect a union representative" (A. 45-46).[4] Liston did not object to the Board agent's announcement, nor did he request that a correction be made prior to the afternoon polling period in which the remaining approximately one hundred employees were to vote. The Regional Director concluded "that while the announcement complained of did not express the purpose of the election in the precise form appearing on the 'Notice of Election', the announcement cannot be interpreted as denoting partiality to the [Union] or as calling for a vote on its behalf" (A. 48).[5]

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[3]The Company operates three shifts - 11 p.m. to 7 a.m., 7 a.m. to 3:30 p.m., and 3:30 p.m. to 11 p.m. There are three employees on the 11 p.m. to 7 a.m. shift (A. 44).

[4]According to the Board agent, the following announcement was made:

> Good morning. I am Tatjana van der Horst of the National Labor Relations Board. You may now vote for your union representative. The polls are open. You may vote if you wish to do so. You do not have to vote if you do not want to [A. 46].

The Director found it unnecessary to resolve this factual dispute, concluding that neither version was prejudicial (A. 48).

[5]The Notice of Election which was posted prominently in the plant stated that:

> This election is to determine the representative, if any, desired by the eligible employees for purposes of collective bargaining with their Employer * * * [A. 47].

The Board, adopting the Regional Director's recommendation, certified the Union. Regarding the conduct of the Board agent, the Board stated: "While the Board agent may have and should have made explicit what was implicit in the announcement, i.e., that the right to vote for the union necessarily carried with it the right to vote against the union, we do not believe that the agent's statement was *per se* so violative of the Board's standards of neutrality or so prejudicial to the employees' right to cast a negative vote that a new election must be directed" (Pet. App. 12a).[6]

Following certification of the Union, the Company refused to bargain and the Board found that the Company's refusal violated Section 8(a)(5) and (1) of the Act (Pet. App. 18a). The Board rejected the Company's contention that this Court's decision in *National Labor Relations Board* v. *Savair Manufacturing Co.*, 414 U.S. 270, required dismissal of the complaint. The Board explained (Pet. App. 17a-18a):

> In *Savair*, the Supreme Court observed that a union could preserve its legitimate interest by the "waiver of initiation fees available not only to those who have signed up with the union before an election but also to those who join after the election." Here, unlike *Savair*, there was not a waiver limited to those who signed a card for the Union before the election. Rather, in the case before us, the "waiver" extended to all employees, as no employee, whether or not he gave preelection support to the Union, was required to pay initiation fees or dues until after the Union was certified and had a contract with the Employer. We find, therefore, that this was not an improper waiver under the holding of *Savair* and it did not interfere with the election. [Footnotes omitted.]

---

[6]Chairman Miller dissented on this point (Pet. App. 13a).

The Board, *inter alia*, ordered the Company to bargain with the Union (Pet. App. 18a; A. 15-16).

B. The Decision of the Court of Appeals

The court of appeals upheld the Board's decision and enforced its order (Pet. App. 1a-6a). The court agreed with the Board's reading of "*Savair* as precluding waivers of fees only when they are offered to employees as an inducement for pre-election support" (Pet. App. 4a-5a). The court further agreed that the Board agent's statement was not "*per se* violative of the Board's standards of neutrality," and "that the circumstances surrounding the statement established that the integrity of the election process was not so impaired as to warrant the ordering of a new election" (Pet. App. 3a).

ARGUMENT

1. In *National Labor Relations Board* v. *Savair Manufacturing Co.*, 414 U.S. 270, this Court disapproved a union's offer to waive initiation fees for all employees who signed union authorization cards before a Board election, stating, "[w]e do not believe that the statutory policy of fair elections * * * permits endorsements, whether for or against the union, to be bought and sold in this fashion" (*id.* at 277). However, the Court expressly distinguished the situation here. It recognized that there was a "legitimate" union interest in "waiving the initiation fee when the union has not yet been chosen as a bargaining representative, because '[e]mployees otherwise sympathetic to the union might well have been reluctant to pay out money before the union had done anything for them * * *,' " and added that this interest "can be preserved * * * by waiver of initiation fees available not only to those who have signed up with the union before an election, but also to those who join after the election" (*id.* at 272-274, n. 4). This is what the Union did here.[7]

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[7]Moreover, as shown, the Union's waiver offer was not made in connection with card solicitation but to counter Company statements concerning the unwarranted cost of union membership (*supra*, p. 3, n. 2).

2. The additional issue raised in the petition—whether the Board "has discretion to determine that an election is valid where its agent * * * engages in acts admittedly violative of the Board's required neutrality and impartiality" (Pet. 3)—is not presented on this record. For the court of appeals upheld the Board's finding that the agent's statement was not "*per se* violative of the Board's standards of neutrality" (*supra*, p. 6). In any event, the Board did not abuse its discretion concerning the conduct of representation proceedings (*National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 330-331) in determining that, in the circumstances here, the integrity of the election process was not impaired by the agent's statement. As the court below noted (Pet. App. 3a), the announcement was made immediately prior to the early morning opening of the polls (when only three workers were scheduled to vote) and was not repeated when the polls reopened in the afternoon to accommodate the bulk of the voters. Moreover, Company official Liston heard the announcement and made no protest or request for correction at a time when correction easily could have been made.[8]

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[8]Contrary to petitioner's contention (Pet. 7-8), the decision here does not conflict with prevailing law in the First and Fifth Circuits, for the cases relied on are factually distinguishable. *National Labor Relations Board* v. *Athbro Precision Engineering Corp.*, 423 F.2d 573 (C.A. 1), upheld a Board decision to require a rerun election where the Board agent during a recess in the voting drank beer with the union representative in a public cafe. And in *Delta Drilling Co.* v. *National Labor Relations Board*, 406 F.2d 109, 113-114, the Fifth Circuit held that the Board's ruling in *Athbro* required a similar result when the Board agent joined the union representative in the latter's motel room during the course of the election. In *National Labor Relations Board* v. *Dobbs Houses, Inc.*, 435 F.2d 704, on the other hand, the Fifth Circuit upheld the Board's determination that the Board agent's statements of support for the union, elicited by questions of the company's election observer, did not taint the election.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board.

JUNE 1975.

SUPREME COURT, U. S.

FILED
AUG 21 1975
MICHAEL RODAK, JR., CLERK

No. 74-1381

In the
Supreme Court of the United States
October Term, 1974

WABASH TRANSFORMER CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONER'S REPLY TO THE NATIONAL LABOR RELATIONS BOARD BRIEF IN OPPOSITION

George W. Moehlenhof
Frank E. Peters, Jr.
Attorneys for Petitioner

McDermott, Will & Emery
111 West Monroe Street
Chicago, Illinois 60606

The Scheffer Press, Inc.—(312) 263-6850

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1381

WABASH TRANSFORMER CORPORATION,

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vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S REPLY TO THE NATIONAL LABOR RELATIONS BOARD BRIEF IN OPPOSITION

Every argument advanced by the National Labor Relations Board as a reason for not granting a writ of certiorari in the instant case is erroneous and misleading. In fact, the arguments are directed to the merits of the case and not to the question of whether a writ should be granted.

1. The Board's argument based on *National Labor Relations Board* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973) is based solely on the fourth footnote from this Court's Opinion in that decision. However, the fourth footnote does not form a part of the holding of the Court in *Savair*, since it merely contains a description of the argu-

ments made by the Board in that case, which were rejected by the Court. In effect, what the Board is doing is citing to their brief which was unsuccessful in a prior case and arguing that it is the Court's reasoning therein.

2. The Board's argument that the Board did not hold the agent's statement "*per se* so violative of the Board's standard of neutrality" is an accurate quotation from the Board's decision, but the decision itself misrepresents the holding of the Board when viewed in the light of the adjudicative techniques employed during the course of litigation before the Board. Since the Board failed to conduct a hearing prior to issuing its decision, the decision must be construed as holding that the agent's statement was not violative of the Board's standard of neutrality and that no amount of evidence which might have been produced at a hearing could render it objectionable. In sum, the procedures followed by the Board in this case are the administrative analogy to a grant of summary judgment by a federal district court.

3. The Board's reliance on *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324 (1946) is misplaced. The discretion of the Board in *A. J. Tower Co.* is not plenary; on the contrary, discretion in election matters is conditional, limited to the purpose for which the discretion is exercised, i.e. "establishing the procedures and safe guards necessary *to ensure a fair and free choice* of bargaining representatives by employees." 329 U.S. at 330, [emphasis supplied.] Thus, while *A. J. Tower* is controlling in a case where the Board has endorsed an election procedure, it is not relevant in a case such as this where the Board has criticized the agent's conduct, but nevertheless failed to overturn an election. Since it is obvious that the Board in its decision was not establishing procedures for elections, reliance on *A. J. Tower* is erroneous.

4. The argument that the statement was not repeated at the beginning of the second polling period is incredible. First, it implicitedly admits that the statement made prior to the first polling period was objectionable. Secondly, the Board in its conduct of elections is charged with the responsibility to remain impartial throughout the entire conduct of an election, and the fact that an agent did not breach this obligation twice, does not excuse the fact that she breached it once.

5. The argument that the record contains no evidence of an objection by the Employer's manager of manufacturing at the time the statement was made is an unfair construction of the record and is factually erroneous. Because the Board failed to conduct a hearing, there is no fully developed record in this case. What the Board has referred to as a record is merely a series of administrative decisions, written by the Board itself, which contain only the facts the Board chose to include. There has never been an opportunity to establish the fact that the Employer did object to the statement. An objection was made *immediately* by the Employer's counsel who was present at the time of the announcement and yet nothing was done to cure its impact. While the Employer acknowledges that the presentation of this matter at this stage in the proceedings concededly amounts to the injection of evidentiary matters during the appellate process, it is believed justified due to the Board's reliance on the absence of record matters—an absence which exists only because the Board refused to open the record.

Finally, the Board's argument ignores the fact that, by the Board's own regulations, any party to an election is allowed five days to file objections and is under no burden to register them immediately. Rules and Regulations of the National Labor Relations Board, Series 8, as amended. 29 CFR §102.69.

6. The Board's contention that there is no conflict between the decision here and prevailing law in the First and Fifth Circuits is transparently weak. The Board's argument ignores the standard of complete and absolute neutrality required by the First and Fifth Circuits of Board agents in the conduct of elections.

Respectfully submitted,

McDermott, Will & Emery

By:.....
George W. Moehlenhof

By:.....
Frank E. Peters, Jr.

McDermott, Will & Emery
111 West Monroe Street
Chicago, Illinois 60603
Telephone: 372-2000